Supreme Court

OF THE UNITED STATES.

ERASTUS MEAD, Appellant,

AGAINST

JOHN THOMPSON, Bankrupt,

No 249

MERCHANTS' EX. BANK, Appellant,

AGAINST

JOHN THOMPSON, Bankrupt.

No 250

PRELIMINARY BRIEF FOR DISMISSAL.

The only mode of review at the Circuit was by petition, under 2d section of the act. 1866. 505

Buddick v. Billings, 3 B. R., 14; 1 Wool, 330.
In re. O'Brien, B. R., sup. 38.
In re. Hall, 1 Dillon, 586.

In such cases no appeal lies to this court.

Morgan v. Thornhill, 5 B. R. ,1.
S. C., 11 Wallace, 65.
Hall v. Allen, 12 Wallace, 432.
Matter of Alexp. 5 Am. Law. Reg 423

AMASA J. PARKER,
Counsel for Respondent.

E Morgan atty

Judge Davis.

Submitted 9 Jan 73

Miller

Delivered Opinion

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 539. ~~344~~ 92

THE COMMERCIAL BANK OF ROCHESTER, PLAINTIFF IN ERROR,

vs.

THE CITY OF ROCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MAY 17, 1871.

Dec. D. 1872

SUPREME COURT OF THE UNITED STATES.

No. 539.

THE COMMERCIAL BANK OF ROCHESTER, PLAINTIFF IN ERROR,

VS.

THE CITY OF ROCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the supreme court of the State of New York, in the seventh judicial district of said State, greeting:

Because, in the record and proceedings, as also in the rendition of the decision & judgment of a plea which is before you, by remittitur from the court of appeals of the State of New York, being the highest court of law and equity, or either, of said State, in which a decision could be had in the said suit between The Commercial Bank of Rochester, plaintiff, and The City of Rochester, defendant, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity; and wherein, also, was drawn in question an authority exercised under the United States, and the decision was against the validity of such authority; and wherein was also drawn in question the construction of a statute of the United States, and the said decision & judgment was against the exemption specially set up and
2 claimed by the said The Commercial Bank of Rochester under the said statute of the United States, a manifest error hath happened, to the great damage of the said The Commercial Bank of Rochester, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgmunt be therein given, that then, under your seal, distinctly and openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then & there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
3 said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] AUGUSTUS A. BOYCE,
Clerk of the Circuit Court of the United States for the Northern District of New York.

The above writ of error is hereby allowed this 23rd day of December, 1869.

WARD HUNT,
Chief Judge of the Court of Appeals of the State of New York.

4 (Indorsed:) Supreme Court. The Commercial Bank of Rochester, pl'ff in error, vs. The City of Rochester, def't in error. Writ of error to U. S. Supreme Court. Edw'd Harris, att'y for pl'ff in error, Rochester, N. Y. Filed 25th Dec., 1869.

5 *Return to writ of error.*

The answer of the justices of the supreme court of the State of New York, in the seventh judicial district, to the foregoing writ:

The justices aforesaid, in obedience to the command contained in the

said writ, do certify & return under the seal of our said court, to the Supreme Court of the United States, at the time and place in said writ mentioned; that a transcript of the judgment, record, & proceedings, whereof mention is made in said writ, is hereto annexed as Schedule A.

We further certify & return that said judgment, whereof said Schedule A is a transcript, was & is the final judgment rendered by the highest court of the said State of New York in which a decision could be had in the suit in said writ mentioned, to wit, the court of appeals; and that by the remittitur from the said court of appeals, the said decision & judgment of said court of appeals was made the judgment of
6 the said supreme court of the State of New York, on the 15th day of December, 1869, as is in said Schedule A fully stated.

We further certify & return that, within ten days from the rendition of said judgment, to wit, on the 25th day of December, 1869, the said writ was duly served upon the clerk of the said supreme court of the State of New York, in whose office said judgment was duly entered, & remains of record; and that said writ was on that day duly filed with said clerk, and that at the same time there was also left with said clerk a copy of said writ for the attorney of the defendant in error in said writ mentioned, with an endorsement thereon as follows: "Copy of a writ of error, lodged in pursuance of the statute of the United States in such case made & provided for the above named The City of Rochester, defendant in error. Edward Harris, attorney for plaintiff in error." And that at the same time there was also served upon said clerk & filed in his office a citation, duly signed by Hon. Ward
7 Hunt, chief judge of the said court of appeals, with an admission of due service of a copy thereof on the attorney for said defendant in error, on the 25th day of December, 1869, which citation, with the admission of said service, signed by the said defendant in error, is hereto annexed as Schedule B.

That, at the same time, to wit, on the 25th day of December, 1870, the petition herewith returned as Schedule C, & upon which said writ was allowed, was also filed with said clerk.

That, at the same time, to wit, on the day last mentioned, there was also duly filed with said clerk a bond, which is herewith returned as Schedule D, together with the due approval & allowance thereof thereon endorsed.

In witness whereof the justices aforesaid of said supreme court of the State of New York have caused these presents to be signed
8 by its clerk, and the seal of said court to be affixed this the first Monday of December, A. D. eighteen hundred & seventy.

By the court.

[SEAL.] CHARLES J. POWERS, *Clerk.*

9 SCHED. A.

In court of appeals. From seventh district.

THE COMMERCIAL BANK OF ROCHESTER, appellant,
ag'st
THE CITY OF ROCHESTER, RESPONDENT.

This is an appeal from a judgment against the plaintiff ordered upon a demurrer to the plaintiff's complaint.

Notice of appeal from judgment.

In supreme court, county of Monroe.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

Please to take notice that The Commercial Bank of Rochester, the plaintiff in the above-entitled action, appeals from a judgment entered therein, on the tenth day of October, 1864, in favor of the defendant, against the plaintiff, for one hundred seventeen dollars and
10 thirteen cents costs, to the court of appeals.

Yours, &c.,

STRONG & MUMFORD,
Attorneys for Appellant.

To G. W. MILLER, Esq.,
Attorney for Respondent, and
JOSEPH COCHRANE, Esq.,
Clerk of the County of Monroe.

Summons for relief.

Supreme court, county of Monroe.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

To The City of Rochester, defendant:

You are hereby summoned to answer the complaint of The Commercial Bank of Rochester, plaintiff, a copy of which will be filed in the clerk's office of Monroe County, at Rochester, and to serve a copy of your answer on the subscriber at Rochester, N Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will apply to the court for the relief demanded in the complaint.

PALMER & MUMFORD,
Plaintiff's Attorneys.

In supreme court, Monroe County.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

The Commercial Bank of Rochester, the plaintiff in this action, for complaint, herein states:

That the said plaintiff is a banking association, duly organized under and in pursuance of the laws of the State of New York, and located and doing business in the city of Rochester, in said county of
11 Monroe, and that the said defendant is a municipal corporation, duly incorporated under and by virtue of the laws of the said State of New York, and having the powers, and being subject to the duties conferred and imposed by an act of the legislature of the State

of New York, entitled "An act to amend and consolidate the several acts relating to the city of Rochester," passed April 10th, 1850, and the several acts supplementary thereto, and amendatory thereof, and as such municipal corporation was authorized and empowered annually to direct the raising, assessment and collection of such sum and sums by assessment and tax upon the property within the corporation limits, not exempt from assessment and taxation, as might be necessary for defraying the expenses of the government of said city.

And said plaintiffs further say that as such banking association it now has, and for one year and over last past has had, a capital stock, paid in and secured, amounting to the sum of five hundred thousand dollars; that a portion of said capital stock, to wit, the sum of seventy-five thousand seven hundred and forty-eight dollars has heretofore been and now is invested in and represented by real estate situate in said city of Rochester, held and owned by said plaintiff, and either necessary for its immediate accommodation in the convenient transaction of its business, or purchased by said plaintiff under decrees or mortgages held by it and given to secure some portion of the said capital stock; that the aggregate amount of its personal property is four hundred and twenty-four thousand two hundred and fifty-two dollars; that of this amount of personal property, part thereof, to wit, the sum of one hundred thousand dollars, now is, and for one year or upwards last past has been, invested in and represented by public stocks of the United States, being portions of several of the loans of the United States, which said United States stocks are, and for one year or thereabouts last past have been,
12 deposited with and held by the superintendent of the banking department of the State of New York, as security for the circulating notes of said bank, under and in pursuance of the laws of the State of New York, and that the balance of said personal property, amounting to the sum of three hundred and twenty-four thousand two hundred and fifty-two dollars, has been and is invested in, and represented by, money and securities other than real estate and United States or Government loans.

And the said plaintiff further says that among the officers and agents of said defendant are three assessors of said defendant, whose duty it is to make an annual assessment of the property in the city, not exempt from assessment and taxation, for the purpose of enabling the said defendant, by its common council, to levy the necessary taxes and assessments to defray the expenses of the city government as aforesaid; that among other things, after having made such assessment, it is made the duty of said assessors on or before the fifteenth day of June in each year, to deliver to the clerk in said city the assessment roll so made by them.

The said assessors, after making said assessments for the year 1860, to wit, on or about the first day of June, 1860, met at their office in the said city, for the purpose of hearing allegations on behalf of such parties as might feel aggrieved by such assessment, and of making corrections, if by them deemed expedient, to the assessments so made.

And the said plaintiff further says that, upon examining said assessment rolls containing said assessments in respect to this plaintiff for the year 1860, it appeared, and so was the fact, that said assessors have assessed this plaintiff on account of personal property belonging to it, the full sum of $424,252.

And this plaintiff further says that, on or about the first day of June, 1860, the said plaintiff made or caused to be made in all respects as

required by law, and delivered to the assessors of the said city
13 of Rochester, that being the place in which the said plaintiff was liable to be taxed, a written statement, made and signed by the vice-president and financial officer of said plaintiff, he being the proper officer for that purpose, duly certified, under the oath of said vice-president to be in all respects just and true, specifying the real estate owned by said plaintiff in the town or ward in which the same is situated, and the sums actually paid therefor; also, the capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate; and that, in and by said statement so made, certified, and delivered, as aforesaid, it further appeared that a portion of the personal property or stock of said bank so paid and secured as aforesaid, to wit, the sum of one hundred thousand dollars had been and was at the time of the making and delivering of said statement and making of said assessment, invested in, and represented by, United States stocks, being parts of several loans of the Government of the United States, which stocks are not and were not, as this plaintiff is advised and believes, liable to assessment or taxation, or legally taxable by or for the benefit of the said defendant; and this plaintiff claimed and insisted to said assessors that said United States stocks were exempt from taxation and ought not to be assessed as a part of the taxable property and capital of this plaintiff, and requested the said assessors to assess the personal property of the said plaintiff at the said sum of four hundred and twenty-four thousand two hundred and fifty-two dollars, less the said sum of one hundred thousand, part thereof so invested in United States stocks, as aforesaid, leaving a balance of said personal property liable to be assessed amounting to the sum of three hundred and twenty-four thousand two hundred and fifty-two dollars, and no more. Yet the said assessors wholly refused to allow or deduct the said sum of one hundred thousand dollars so invested in United
States stocks from the amount of said personal property so
14 assessed, but did assess the said plaintiff as and for personal property, the full sum of four hundred and twenty-four thousand two hundred and fifty-two dollars; and thereupon and on the same day of the date of their decision refusing to make the deduction claimed, to wit, shortly prior to the 15th day of June, 1860, delivered over to the said city clerk the assessment rolls aforesaid.

And the said plaintiff further says that, afterwards, and on or about the 25th day of June, 1860, subsequent to the delivery of said assessment rolls to said city clerk, and prior to the levying of the taxes thereupon by the said defendant, the said plaintiff, by its vice-president and financial officer aforesaid, stated and represented to the common council of said city, in writing, that the said assessors had assessed the personal property of said plaintiff at $424,252, whereas it should not exceed the sum of $324,252; that said assessors had erred in refusing to deduct the sum of $100,000, part of the personal property of said plaintiff so invested in the public stocks of the Government of the United States, and in disregarding the statement and certificate of said plaintiff, so delivered to said assessors, and requested and asked the said defendant, by its said common council, to correct said error and said assessment, and remit from said assessment the sum of $100,000. But the said defendant, by its common council, disregarding the right of the said plaintiff, and its duty in that behalf, wholly refused to correct the said assessment, or to remit the said assessment, or any part thereof; that, afterwards, and on or about the 25th day of June, 1860,

the said defendant, by its common council, did confirm said assessment and levy, and direct the collection of the taxes thereupon; that the amount so assessed, levied, and directed to be collected of this plaintiff on account of its personal property as aforesaid, was and is the sum of $6,194 07; that, of this sum the sum of $1,460 is the tax upon the $100,000 of the personal property of said plaintiff so invested
15 in the public stocks of the United States, as aforesaid, which, in like manner, the said defendant, by its said common council, did levy upon the property of said plaintiff, and order and direct to be collected of said plaintiff.

This plaintiff further says that, afterwards, and on or about the 24th day of July, 1860, at a regular meeting of the said common council, and upon application of this plaintiff therefor, the said common council duly passed and adopted the following resolution:

"*Resolved*, That in case the Commercial Bank shall pay its tax and assessment at any time prior to the issuing of a warrant for the collection thereof, such payment shall not be treated or regarded as a voluntary payment, but as a payment under protest and after the issuing of such warrant and a levy upon its property to enforce such payment."

That, thereafter, and on or about the 28th day of July, 1860, and prior to the issuing of any warrant for the collection of said tax and assessment under and in pursuance of the authority, consent, and agreement granted and entered into by the said defendant, through its said common council as aforesaid, and upon the faith thereof, and not otherwise, this plaintiff did pay to the said defendant, and the said defendant did receive the said sum of six thousand one hundred and ninety-four dollars and seven cents, being the amount of said tax so assessed upon the whole of its personal property as aforesaid, including the said sum of fourteen hundred and sixty dollars, the tax upon said $100,000 of personal property so exempt as aforesaid.

And this plaintiff further says that it is advised and believes, and therefore claims that the said portion of its personal property so invested in United States stocks as aforesaid, was not liable or subject to assessment or taxation; that the assessors erred in assessing such portion, as well as the defendant in confirming such assessment, and levying and collecting the taxes thereupon; that such assessment and tax
16 were and are illegal and void, and that the said plaintiff was unjustly and illegally compelled by said defendant to and did pay to said defendant the sum of fourteen hundred and sixty dollars, being part of the tax so paid as aforesaid, and being the portion of said tax so assessed upon that part of the said personal property so invested in and represented by United States stocks, and so exempt from assessment and taxation as aforesaid.

That heretofore and subsequent to said twenty-eighth day of July, 1860, this plaintiff demanded of said defendant a repayment of said sum of fourteen hundred and sixty dollars, so unjustly and illegally collected and received of this plaintiff; but that said defendant wholly declined and refused to repay said sum or any part thereof.

Wherefore this plaintiff demands judgment against the said defendant for the said sum of fourteen hundred and sixty dollars, and interest thereon from the twenty-eighth day of July, 1860, besides costs.

PALMER & MUMFORD,
Plaintiff's Attorneys.

Supreme court.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

This defendant demurs to the plaintiff's complaint herein, because it does not state facts sufficient to constitute a cause of action.

JOHN L. REQUA,
Defendant's Attorney.

17 At a special term of the supreme court held at the court-house in Rochester, on the 21st day of March, 1864—present, Hon. Henry Welles, justice.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

This case having been called at this term of the court, and the attorney for the defendant appearing:

On motion of Messrs. Strong & Mumford, attorneys for the plaintiff, after hearing Mr. G. W. Miller, defendant's attorney, it is hereby ordered that the demurrer interposed by the defendant to the complaint herein, be, and the same is hereby, overruled, and that the plaintiff have judgment thereon.

(Copy)

J. O. FISHER,
Special Deputy Clerk.

Judgment.—March 22d, 1864.

In supreme court, Monroe County.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

An issue of law having been joined in this action by the service of a demurrer on the part of the defendant, and this action being upon the calendar, and having been duly called, and an order having been made and entered overruling the said demurrer, and directing judgment for the plaintiff:

It is therefore, on motion of Messrs. Strong & Mumford, plaintiff's attorneys, adjudged that the said demurrer be overruled, and that the plaintiff do recover of the defendant herein the sum of eighteen hundred and twenty-seven dollars and sixteen cents, damages, with forty-two dollars and seventy-two cents costs, amounting in the whole to the sum eighteen hundred and sixty-nine dollars and seventy-eight cents.

J. CUTLER,
Deputy Clerk.

18 Supreme court.

THE COMMERCIAL BANK OF ROCHESTER,
respondent,
ag'st
THE CITY OF ROCHESTER, APP'L'T.

Take notice, that the defendant in the above-entitled action appeals to

the general term of this court, from the judgment of the special term, on demurrer entered March 4th, 1864.

Yours, &c,

GEO. W. MILLER,
Defendant's Attorney.

To STRONG & MUMFORD, Esq's,
Plaintiff's Attorneys, and
J. COCHRANE,
Monroe County Clerk.

At a general term of the supreme court, held at Rochester, Monroe County, on the 17th day of Sept., 1864—present, Hon. E. Darwin Smith, Henry Welles, Ja's C. Smith, justices.

THE COMMERCIAL BANK OF ROCHESTER, respondent,
ag'st
THE CITY OF ROCHESTER, APP'L'T.

Judgment of special term reversed. Judgment ordered for defendant on demurrer. Justice E. D. Smith dissenting.

(Copy) J. M. BARDWELL,
Ass't Dep. Clerk.

Supreme court.

THE COMMERCIAL BANK OF ROCHESTER, respondent,
ag'st
THE CITY OF ROCHESTER, APPELLANT.

MONROE COUNTY, CLERK'S OFFICE,
October 10, 1864.

The appeal from the judgment of the special term overruling the demurrer in this action having been brought on for argument, and, after hearing George W. Miller, of counsel for appellant, and Theron
19 R. Strong, of counsel for respondent, the general term of this court having reversed the judgment of the special term, and ordered judgment to be given for the defendant on the demurrer, now, on motion of Geo. W. Miller, attorney for the appellant, it is hereby ordered that the judgment of the special term overruling the demurrer in this action be reversed, and that judgment in this action is hereby rendered in favor of defendant on demurrer, and for one hundred and seventeen $\frac{13}{100}$ dollars, costs.

J. CUTLER, *Dep. Clerk.*

STATE OF NEW YORK,
Monroe County, Clerk's Office, ss:

I do hereby certify that I have compared the copy of a judgment-roll and notice of appeal, hereunto annexed, with the original now remaining on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, this 3d day of November, A. D. 1864.

[L. S.] JOSEPH COCHRANE, *Clerk.*

[Rev. stamp.]

20 COURT OF APPEALS,
State of New York, ss:

Pleas in the court of appeals held at the court-house in the city of New York, on the 9th day of October, in the year of our Lord, one thousand eight hundred and sixty-nine, before the judges of said court. Witness, the Hon. Ward Hunt, chief judge, presiding.

E. O. PERRIN,
Clerk.

Remittitur.—Oct. 18, 1869.

THE COMMERCIAL BANK OF ROCHESTER, APP'L'TS
vs.
THE CITY OF ROCHESTER, RESP'T.

Be it remembered that, on the 5th day of November, in the year of our Lord one thousand eight hundred & sixty-four, The Commercial Bank of Rochester, the appellant in this action, came here by Mr. Edward Harris, its attorney, and filed in said court a notice of appeal and
21 return thereto, from the judgment of the supreme court. And The City of Rochester, the respondent in said action, afterwards appeared in said court of appeals, by Geo. W. Miller, its attorney, which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, the cause having been submitted on printed argument, and after due deliberation had thereon, did order & adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed. And it was further ordered & adjudged that the respondent recover against the appellant its costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings of this court be remitted to the said supreme court, there to be proceeded upon according to law.

22 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well the notice of appeal & return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, & which record now remains in the said supreme court, before the justices thereof, &c.

[L. S.] COR'S TEN BROECK,
Deputy Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS CLERK'S OFFICE,
Albany, Oct. 18, 1869.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with
23 the papers originally filed therein attached thereto.

[L. S.] COR'S TEN BROECK,
Deputy Clerk.

24 At a special term of the supreme court held at the city of Rochester on the 15th day of December, 1869—present, Hon. T. A. Johnson, justice.

THE COMMERCIAL BANK OF ROCHESTER, APP'L'T,
ag't
THE CITY OF ROCHESTER, RESP'T.

The Commercial Bank of Rochester appealed to the court of appeals from the judgment of the general term of this court, bearing date October 10, 1864, which judgment was signed by the clerk of this court and duly entered in his office on the 10th day of October, 1864; & said court of appeals having affirmed the judgment of this court, now, on reading & filing the remittitur from the said court of appeals, & on motion of Geo. W. Miller, attorney for the respondent, it is ordered that the judgment of the court of appeals be, & the same is hereby, made the judgment of this court, & that the respondent have execution
25 thereon.

CHARLES J. POWERS,
Clerk.

26 *Judgment of affirmance—Costs*, $317 48.

Supreme court.

MONROE COUNTY CLERK'S OFFICE, *Dec.* 15, 1869.

THE COMMERCIAL BANK OF ROCHESTER, APP'L'T,
ag'st
THE CITY OF ROCHESTER, RESP'T.

The above named appellant having appealed from the judgment of the general term of the supreme court to the court of appeals, & the court of appeals having affirmed the judgment of the general term, entered October 10, 1864, in all things, & the remittitur from said court of appeals having been presented, read, & filed, & the judgment of the court of appeals ordered by the supreme court to be the judgment of this court:

Now, on motion of Geo. W. Miller, attorney for respondent, ordered that judgment be, and the same hereby is, given & entered affirming said judgment of the general term, dated October 10, 1864, & that the said respondent recover of the said appellant the sum of three hundred & seventeen dollars & forty-eight cents costs, on said appeal
27 to the court of appeals.

CHARLES J. POWERS, *Clerk.*

(Indorsed:) Schedule A.

28 "SCHEDULE B."

Citation.

The United States of America to The City of Rochester, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first

Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, in the county of Monroe, wherein The Commercial Bank of Rochester is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment, rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ward Hunt, chief judge of the court of appeals of the State of New York, this 24th day of December, 1869.

WARD HUNT.

29 (Indorsed:) Supreme Court. The Commercial Bank of Rochester, pl'ff in error, vs. The City of Rochester, def't in error. Citation to def't in error to appear in U. S. Supreme Court. Edw'd Harris, att'y for pl'ff in error. Filed 25th Dec., 1869.

I admit due service of a copy of the within citation.
Dec. 25, 1869.

GEO. W. MILLER, *Att'y for Def't.*

30 "SCHEDULE C."

In court of appeals, from seventh district.

THE COMMERCIAL BANK OF ROCHESTER, appellant,
ag'st
THE CITY OF ROCHESTER, RESPONDENT.

This is an appeal from a judgment against the plaintiff, ordered upon a demurrer to the plaintiff's complaint.

Notice of appeal from judgment.

In supreme court, county of Monroe.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

Please to take notice that The Commercial Bank of Rochester, the plaintiff in the above-entitled action, appeals from a judgment entered therein, on the tenth day of October, 1864, in favor of the defend-
31 ant against the plaintiff, for one hundred seventeen dollars and thirteen cents costs, to the court of appeals.

Yours, &c.,

STRONG & MUMFORD,
Attorneys for Appellant.

To G. W. MILLER, Esq.,
Attorney for Respondent, and
JOSEPH COCHRANE, Esq.,
Clerk of the County of Monroe.

Summons for relief.

Supreme court, county of Monroe.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

To The City of Rochester, defendant:

You are hereby summoned to answer the complaint of The Commercial Bank of Rochester, plaintiff, a copy of which will be filed in clerk's office of Monroe County, at Rochester, and to serve a copy of your answer on the subscriber at Rochester, N. Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will apply to the court for the relief demanded in the complaint.

PALMER & MUMFORD,
Plaintiff's Attorneys.

In supreme court, Monroe County.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

The Commercial Bank of Rochester, the plaintiff in this action, for complaint, herein states:

That the said plaintiff is a banking association, duly organized under and in pursuance of the laws of the State of New York, and located and doing business in the city of Rochester, in said county of Monroe,
32 and that the said defendant is a municipal corporation duly incorporated under and by virtue of the laws of the said State of New York, and having the powers, and being subject to the duties conferred and imposed by an act of the legislature of the State of New York, entitled "An act to amend and consolidate the several acts relating to the city of Rochester," passed April 10th, 1850, and the several acts supplementary thereto, and amendatory thereof, and as such municipal corporation was authorized and empowered annually to direct the raising, assessment, and collection of such sum and sums by assessment and tax upon the property within the corporation limits, not exempt from assessment and taxation, as might be necessary for defraying the expenses of the government of said city.

And said plaintiffs further say that, as such banking association, it now has, and for one year and over last past has had, a capital stock, paid in and secured, amounting to the sum of five hundred thousand dollars; that a portion of said capital stock, to wit, the sum of seventy-five thousand seven hundred and forty-eight dollars has heretofore been and now is invested in and represented by real estate situate in said city of Rochester, held and owned by said plaintiff, and either necessary for its immediate accommodation in the convenient transactions of its business, or purchased by said plaintiff, under decrees or mortgages held by it, and given to secure some portion of the said capital stock; that the aggregate amount of its personal property is four hundred and twenty-four thousand two hundred and fifty-two dollars; that of this amount of personal property, part thereof, to wit, the sum of one hundred thousand dollars, now is, and for one year or upwards last past has been, invested in and represented by public stocks

of the United States, being portions of several of the loans of the United States, which said United States stocks are, and for one
33 year or thereabouts last past have been, deposited with and held by the superintendent of the banking department of the State of New York, as security for the circulating notes of said bank, under and in pursuance of the laws of the State of New York; and that the balance of said personal property, amounting to the sum of three hundred and twenty-four thousand two hundred and fifty-two dollars, has been and is invested in and represented by money and securities other than real estate and United States or Government loans.

And the said plaintiff further says that among the officers and agents of said defendant are three assessors, who form and constitute the board of assessors of said defendant, whose duty it is to make an annual assessment of the property in the city, not exempt from assessment and taxation, for the purpose of enabling the said defendant, by its common council, to levy the necessary taxes and assessments to defray the expenses of the city government as aforesaid; that, among other things, after having made such assessment, it is made the duty of said assessors, on or before the fifteenth day of June in each year, to deliver to the clerk of said city the assessment roll so made by them.

That said assessors, after making said assessments for the year 1860, to wit, on or about the first day of June, 1860, met at their office, in the said city, for the purpose of hearing allegations on behalf of such parties as might feel aggrieved by such assessment, and of making corrections, if by them deemed expedient, to the assessments so made.

And the said plaintiff further says that, upon examining assessment rolls containing said assessments, in respect to this plaintiff for the year 1860, it appeared, and so was the fact, that said assessors have assessed this plaintiff, on account of personal property belonging to it, the full sum of $424,252.

And this plaintiff further says that, on or about the first day of June, 1860, the said plaintiff made, or caused to be made, in all
34 respects as required by law, and delivered to the assessors of the said city of Rochester—that being the place in which the said plaintiff was liable to be taxed—a written statement, made and signed by the vice-president and financial officer of said plaintiff, he being the proper officer for that purpose, duly certified, under the oath of said vice-president, to be in all respects just and true, specifying the real estate owned by said plaintiff in the town or ward in which the same is situated, and the sums actually paid therefor; also, the capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate; and that in and by said statement so made, certified, and delivered as aforesaid, it further appeared that a portion of the personal property or stock of said bank, so paid and secured as aforesaid, to wit, the sum of one hundred thousand dollars, had been, and was at the time of the making and delivering of said statement and making of said assessment, invested in and represented by United States stocks, being parts of several loans of the Government of the United States, which stocks are not and were not, as this plaintiff is advised and believes, liable to assessment or taxation, or legally taxable by or for the benefit of the said defendant. And this plaintiff claimed and insisted to said assessors that said United States stocks were exempt from taxation, and ought not to be assessed as a part of the taxable property and capital of this plaintiff, and requested the said assessors to assess the personal property of the said plaintiff at the said sum of four hundred and twenty-four thousand two hundred and fifty-

two dollars, less the said sum of one hundred thousand, part thereof so invested in United States stocks as aforesaid, leaving a balance of said personal property liable to be assessed amounting to the sum of three hundred and twenty-four thousand two hundred and fifty-two dollars, and no more. Yet the said assessors wholly refused to allow or
35 deduct the said sum of one hundred thousand dollars, so invested in United States stocks, from the amount of said personal property so assessed, but did assess the said plaintiff, as and for personal property, the full sum of four hundred and twenty-four thousand two hundred and fifty-two dollars; and thereupon, and on the same day of the date of their decision, refusing to make the deduction claimed, to wit, shortly prior to the 15th day of June, 1860, delivered over to the said city clerk the assessment rolls aforesaid.

And the said plaintiff further says that, afterwards, and on or about the 25th day of June, 1860, subsequent to the delivery of said assessment rolls to said city clerk, and prior to the levying of the taxes thereupon by the said defendant, the said plaintiff, by its vice-president and financial officer aforesaid, stated and represented to the common council of said city, in writing, that the said assessors had assessed the personal property of said plaintiff at $424,252, whereas it should not exceed the sum of $324,252; that said assessors had erred in refusing to deduct the sum of $100,000, part of the personal property of said plaintiff so invested in the public stocks of the Government of the United States, and in disregarding the statement and certificate of said plaintiff so delivered to said assessors, and requested and asked the said defendant, by its said common council, to correct said error and said assessment, and remit from said assessment the sum of $100,000. But the said defendant, by its common council, disregarding the right of the said plaintiff and its duty in that behalf, wholly refused to correct the said assessment, or to remit the said assessment, or any part thereof; that, afterwards, and on or about the 25th day of June, 1860, the said defendant, by its common council, did confirm said assessment and levy, and direct the collection of the taxes thereupon; that the amount
36 so assessed, levied, and directed to be collected of this plaintiff, on account of its personal property as aforesaid, was and is the sum of $6,194 07; that of this sum the sum of $1,460 is the tax upon $100,000 of the personal property of said plaintiff so invested in the public stocks of the United States as aforesaid, which in like manner the said defendant, by its said common council, did levy upon the property of said plaintiff, and order and direct to be collected of said plaintiff.

This plaintiff further says that, afterwards, and on or about the 24th day of July, 1860, at a regular meeting of the said common council, and upon application of this plaintiff therefor, the said common council duly passed and adopted the following resolution:

"*Resolved*, That in case the Commercial Bank shall pay its tax and assessment at any time prior to the issuing of a warrant for the collection thereof, such payment shall not be treated or regarded as a voluntary payment, but as a payment under protest and after the issuing of such warrant and a levy upon its property to enforce such payment."

That, thereafter, and on or about the 28th day of July, 1860, and prior to the issuing of any warrant for the collecton of said tax and assessment under and in pursuance of the authority, consent, and agreement granted and entered into by the said defendant, through its said common council as aforesaid, and upon the faith thereof and not otherwise, this plaintiff did pay to the said defendant, and the said defendant did receive, the

said sum of six thousand one hundred and ninety-four dollars and seven cents, being the amount of said tax so assessed upon the whole of its personal property as aforesaid, including the said sum of fourteen hundred and sixty dollars, the tax upon said $100,000 of personal property so exempt as aforesaid.

And this plaintiff further says, that it is advised and believes, and therefore claims that the said portion of its personal property so
37 invested in United States stocks, as aforesaid, was not liable or subject to assessment or taxation; that the assessors erred in assessing such portion as well as the defendant in confirming such assessment, and levying and collecting the taxes thereupon; that such assessment and tax were and are illegal and void, and that the said plaintiff was unjustly and illegally compelled by said defendant to, and did, pay to said defendant the sum of fourteen hundred and sixty dollars, being part of the tax so paid, as aforesaid and being the portion of said tax so assessed upon that part of the said personal property so invested in and represented by United States stocks, and so exempt from assessment and taxation, as aforesaid.

That, heretofore and subsequent to said twenty-eighth day of July, 1860, this plaintiff demanded of said defendant a re-payment of said sum of fourteen hundred and sixty dollars, so unjustly and illegally collected and received of this plaintiff, but that said defendant wholly declined and refused to repay said sum or any part thereof.

Wherefore this plaintiff demands judgment against the said defendant for the said sum of fourteen hundred and sixty dollars and interest thereon from the twenty-eighth day of July, 1860, besides costs.

PALMER & MUMFORD,
Plaintiff's Attorneys.

Supreme court.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

This defendant demurs to the plaintiff's complaint herein, because it does not state facts sufficient to constitute a cause of action.

JOHN L. REQUA,
Defendant's Attorney.

38 At a term of the supreme court, held at the court-house in Rochester, on the 21st day of March, 1864—present, Hon. Henry Welles, justice.

THE COMMERCIAL BANK OF ROCHESTER,
ag'st
THE CITY OF ROCHESTER.

This case having been called at this term of the court, and the attorney for the defendant appearing:

On motion of Messrs. Strong & Mumford, attorneys for the plaintiff, after hearing Mr. G. W. Miller, defendant's attorney, it is hereby ordered that the demurrer interposed by the defendant to the complaint herein, be, and the same is hereby, overruled, and that the plaintiff have judgment thereon.

(Copy.)

J. O. FISHER,
Sp. Dep. Clerk.

Judgment, March 22d, 1864.

In supreme court, Monroe County.

THE COMMERCIAL BANK OF ROCHESTER
ag'st
THE CITY OF ROCHESTER.

An issue of law having been joined in this action by the service of a demurrer on the part of the defendant, and this action being upon the calendar, and having been duly called, and an order having been made and entered overruling the said demurrer, and directing judgment for the plaintiff.

It is therefore, on motion of Messrs. Strong & Mumford, plaintiffs attorneys, adjudged that the said demurrer be overruled, and that the plaintiff do recover of the defendant herein the sum of eighteen hundred and twenty-seven dollars and sixteen cents damages, with forty-two dollars and seventy-two cents costs, amounting in the whole to the sum of eighteen hundred and sixty-nine dollars and seventy-eight cents.

J. CUTLER, *Dep. Clerk.*

39 Supreme court.

THE COMMERCIAL BANK OF ROCHESTER
respondent,
ag'st
THE CITY OF ROCHESTER, APPL'T.

Take notice that the defendant in the above-entitled action appeals to the general term of this court, from the judgment of the special term on demurrer entered March 4th, 1864.

Yours, &c.,

GEO. W. MILLER,
Defendant's Att'y.

To STRONG & MUMFORD, Esqs.,
Plaintiff's attorneys, and
J. COCHRANE,
Monroe County Clerk.

At a general term of the supreme court, held at Rochester, Monroe County, on the 17th day of Sept., 1864—present, Hon. E. Darwin Smith, Henry Welles, Ja's C. Smith, justices.

THE COMMERCIAL BANK OF ROCHESTER,
respondent,
ag'st
THE CITY OF ROCHESTER, APP'L'T.

Judgment of special term reversed. Judgment ordered for defendant on demurrer. Justice E. D. Smith, dissenting.

(Copy.)

J. M. BARDWELL,
Ass't Dep. Clerk.

Supreme court.

THE COMMERCIAL BANK OF ROCHESTER,
respondent,
ag'st
THE CITY OF ROCHESTER, APP'L'T.

MONROE COUNTY CLERK'S OFFICE, *Oct.* 10, 1864.

The appeal from the judgment of the special term overruling the de-

murrer in this action having been brought on for argument, and after hearing George W. Miller, of counsel for appellant, and Theron
39½ R. Strong, of counsel for respondent, the general term of this court having reversed the judgment of the special term, and ordered judgment to be given for the defendant on the demurrer. Now, on motion of Geo. W. Miller, attorney for the appellant, it is hereby ordered that the judgment of the special term overruling the demurrer in this action be reversed, and that judgment in this action is hereby rendered in favor of defendant on demurrer, and for one hundred and seventeen $\frac{13}{100}$ dollars costs.

J. CUTLER, *Dep. Clerk.*

STATE OF NEW YORK,
Monroe County Clerk's Office, ss:

I do hereby certify that I have compared the copy of a judgment-roll and notice of appeal hereunto annexed with the original, now remaining on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county, this 3d day of November, A. D. 1864.

[L. S.] JOSEPH COCHRANE, *Clerk.*

Rev. stamp.

40 Court of appeals of the State of New York.

THE COMMERCIAL BANK OF ROCHESTER, APPELLANT,
against
THE CITY OF ROCHESTER, RESPONDENT.

To the Honorable Ward Hunt, chief justice of the court of appeals of the State of New York:

The petition of the above-named The Commercial Bank of Rochester, by Edward Harris, its attorney, respectfully states that the above-entitled action was commenced in the seventh judicial district of the supreme court of the State of New York, on or about the 19th day of November, 1860, by the above-named, The Commercial Bank of Rochester as plaintiff, against the above-named The City of Rochester as defendant, upon a complaint, a copy of which is hereto annexed, marked A, & to which your petitioner begs leave to refer. That the defendant duly appeared in said action, by its attorney, & served a demurrer to the said complaint of which a copy is hereto annexed, marked B, & to which
41 your petitioner begs leave to refer. That by said demurrer an issue of law was raised in the said order, and no other or different issue has ever been found in said action. Your petitioner begs leave to refer to said complaint of which a copy is annexed as aforesaid, as a part of this petition, & as shewing the facts of this case & the issues of law arising thereon, and your petitioner states that the facts alleged in said complaint & each of them, were & are true as therein stated.

Your petitioner further states that in & by said action, & the complaint therein, the said plaintiff claimed that the $100,000 of its capital stock which was invested in the public stocks of the United States, was exempt from taxation by the State of New York, under & by virtue of the statute of the United States concerning the taxation of said stocks. That the said issue of law was duly argued in the said supreme court of

the State of New York, in the seventh judicial district of said court, & on the 22nd day of March, 1864, a judgment was duly rendered by
42 said court in said action whereby the exemption claimed by said plaintiff as aforesaid was denied, & judgment was rendered in favor of defendant upon the said issue. Your petitioner further states that your petitioner duly appealed from said judgment to the court of appeals of the State of New York; that said appeal has been twice argued in said court—the judges being unable to agree upon the first argument—that the second argument of said appeal was at the last June (1869) term of said court, and at the last September (1869) term of said court, to wit, on the 9th day of October, 1869, the said the court of appeals rendered a decision in said action, whereby the said judgment of the said supreme court was in all things affirmed with costs, whereby the said the court of appeals denied to your said petitioner the said exemption claimed by it under & by virtue of said statute of the United States; that the said court of appeals is the highest court in said State in which a decision of said issue can be had; that said court has
43 sent down the remittitur in said action to the said supreme court of the State of New York with instructions to said court to proceed in said action in accordance with said decision & judgment; that said remittitur was duly filed in the office of the clerk of the said supreme court, at the city of Rochester, in the county of Monroe, in the said judicial district, on the 15th day of December, 1869; and that an order was on the same day duly entered by said supreme court whereby the said decision & judgment of the court of appeals was made the judgment of the said supreme court; and on the day last-mentioned final judgment was duly entered in said action in the said supreme court, in the clerk's office aforesaid, in pursuance of said decision of the court of appeals, whereby the defendant's demurrer to the said plaintiff's complaint is sustained with $317 48 costs of said action to the said defendant. Your petitioner further states that the said judgment is the final judgment of the highest court of judicature of the people of the State
44 of New York; that the said judgment is adverse to the said exemption claimed as aforesaid by the plaintiff, and that the same will so appear by the record of said judgment. Your petitioner therefore prays that a writ of error may be allowed, to the end that said judgment may be re-examined in the Supreme Court of the United States, and that upon proper security, herewith tendered, all proceedings may be stayed on said judgment until the same shall have been re-examined as aforesaid.

And your petitioner as, &c.

THE COMMERCIAL BANK OF ROCHESTER,
By EDWARD HARRIS, *its Attorney.*

STATE OF NEW YORK, *Munroe County, ss:*

Edward Harris, being duly sworn, says that he is the attorney of record in the supreme court of the State of New York, as the attorney of the above-named petitioner, deponent having been duly substituted as said attorney in place of the attorneys named in the record of
45 said judgment; that deponent argued the appeal in said action in the court of appeals of the State of New York; that the facts stated in said petition are true as this deponent verily believes.

EDW'D HARRIS.

Sworn this 22nd day of December, 1869, before me.

ALVIN L. BARTON,
Notary Public.

(Indorsed:) Supreme court. The Commercial Bank of Rochester, resp'd't, vs. The City of Rochester, appellant. Petition for writ of error to U. S. Sup. Court. Edw'd Harris, pl'ff's att'y. Filed 25th, Dec. 1869.

46 SCHED. D.

Know all men by these presents that we, George E. Mumford and Hobart F. Atkinson, of the city of Rochester, county of Monroe, and State of New York, are held and firmly bound unto "The City of Rochester," in said county and State, in the full and just sum of two thousand dollars, to be paid to the said "The City of Rochester," its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 22nd day of December, 1869.

Whereas on the 15th day of December, 1869, the remittitur of the court of appeals of the State of New York was duly filed in the supreme court of said State, in the clerk's office of said court, in the county of Monroe, & upon which remittitur the said court duly rendered a judgment in favor of the defendant, upon its demurrer to the complaint, with $317 48 costs, in a certain action in said court wherein The Commercial Bank of Rochester was plaintiff and the said The City of Rochester was defendant; and the said The Commercial Bank of the City of Rochester having obtained, or being about to obtain, a writ of error to the said supreme court from the Supreme Court of the United States, for the purpose of having said judgment reversed in the court last mentioned, and having filed, or being about to file, a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of Rochester, citing and admonishing the said The City of Rochester to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

47

Now, the condition of the above obligation is such, that if the said The Commercial Bank of Rochester shall prosecute said writ of error to effect, and answer all damages and costs if the said The Commercial Bank of Rochester shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

G. E. MUMFORD. [SEAL.]
H. F. ATKINSON. [SEAL.]

Sealed & delivered in presence of—

48 STATE OF NEW YORK, *Monroe County, ss:*

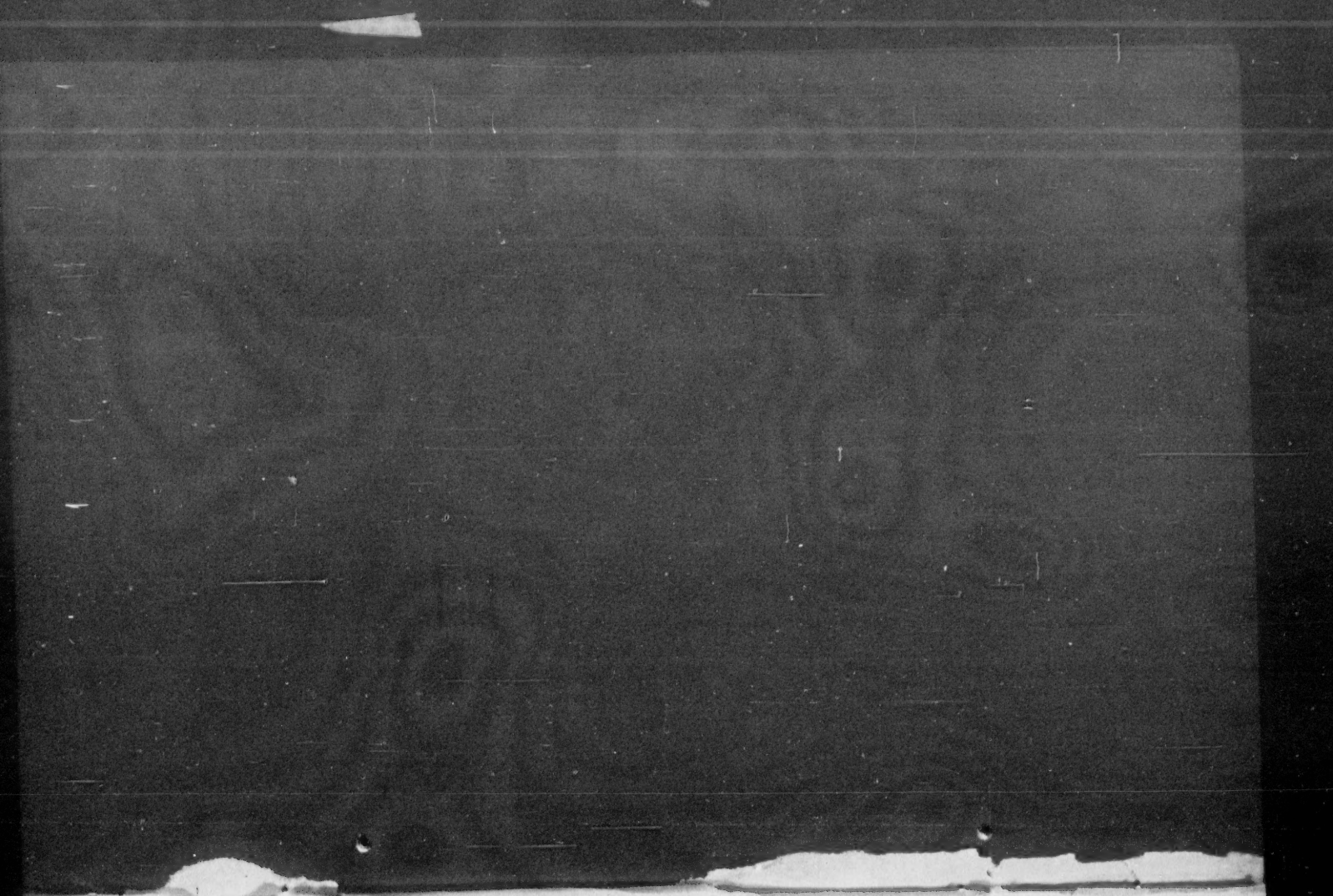
On this 22nd day of December, A. D. 1869, before me, the subscriber, personally appeared George E. Mumford and Hobart F. Atkinson, to me known to be the same person' described in, and who executed the within instrument, and acknowledged that they executed the same.

ALVIN L. BARTON,
Notary Public.

49 (Indorsed:) Supreme court. The Commercial Bank of Rochester, pl'ff in error, vs. The City of Rochester, def't in error. Bond on writ of error to U. S. Sup. Court. Approved. Ward Hunt, Ch. J. Filed 25th Dec. 1869.

(Indorsed:) Supreme court. The Commercial Bank of Rochester, pl'ff in error, ag'st The City of Rochester, def't in error. Return to writ of error to U. S. Supreme Court. Edw'd Harris, att'y for pl'ff in error.

(Indorsement on cover:) No. 539. The Commercial Bank of Rochester, plaintiff in error, vs. The City of Rochester. New York sup. court. Filed 17th May, 1871.



UNITED STATES
SUPREME COURT.

UNITED STATES SUPREME COURT.

THE COMMERCIAL BANK OF ROCHESTER, *Plaintiff in error.* against THE CITY OF ROCHESTER.	Brief for plaintiff in error.

This action was commenced on the 19th day of November, 1860, in the Supreme Court of the State of New York, by the service of a summons and bill of complaint (*See page 17 of error book*). The bill of complaint will be found on *pages 3 to 7*. The defendant appeared in the action and demurred to the complaint; the only ground of demurrer being that the "complaint does not state facts sufficient to constitute a cause of action." *See page 7*. This demurrer was interposed under section 144 of the New York State Code of Procedure. It will be seen by reference to that section and section 147, that this demurrer conceded.

1st. The jurisdiction of the Court.

2d. The plaintiff's legal capacity to sue.

3d. That no other action was pending for the same cause.

4th. That there was no defect of parties plaintiff or defendant.

5th. That several causes of action had not been improperly united. In other words, the defendant by its demurrer insisted that taking the facts alleged in the bill of complaint the law would afford no relief. The demurrer was overruled at the Special Term of the Supreme Court by

Mr Justice Welles, and judgment was ordered for the plaintiff; *page* 7, *fol.* 17. Pursuant to that decision judgment was entered on the 22d day of March, 1864, in favor of the plaintiff and against the defendant for $1,827.16 damages, and $42.72 costs; *page* 7. The defendant appealed from that judgment to the General Term of the Supreme Court, and that Court reversed the judgment, page 8. The plaintiff appealed from the judgment of reversal to the Court of Appeals, which Court affirmed the judgment of the Supreme Court, *pages* 9, 10, 11; and by Writ of Error the cause was removed into this Court on the 23d day of December, 1839.

The return to the Writ of Error will be found at pages 2 to 10.

By which it will be seen that the action was brought to recover the sum of $1,460, which the defendant through its assessors had assessed by way of tax, on one hundred thousand dollars of the public stocks of the United States.

All the facts alleged in the complaint are admitted by the demurrer. Those facts are substantially as follows:

That the plaintiff in error was a Banking Association. That at the time of the making of the alleged assessment, it had a capital of $500,000, of which $100,000 was invested in the public stock of the United States, then held by Superintendent of the Banking Department as security for the circulating notes of the plaintiff; that the whole personal property of the plaintiff was $424,252, including this $100,000 of United States stocks. That the assessors of defendant having made their assessment of all property in the City of Rochester, did on or about the 1st day of June, 1860, meet for the purpose of hearing allegations in behalf of such parties as might feel aggrieved by such assessment, *fol.* 12. That the plaintiff did so appear and proved as required by law, that the said assessors had assessed said $100,000 of United States stock, *fol.* 13; and then and there claimed that such stocks were exempt from taxation, but the assessed did tax the same, *fol.* 13. That after the delivery of the assessment rolls to the clerk of the defendant, the plaintiff applied to the Common Council of

the defendant to correct said assessment, which they refused to do and did confirm the said assessment and direct the collection of the said tax, *fol.* 14.

That the amount of the tax assessed was "$6,194 07; that "of this sum the sum of $1,460 is the tax upon the $100,- "000 of the personal property of said plaintiff so invested "in the public stocks of the United States as aforesaid, "which in like manner said defendant by its said Common "Council, did levy upon the property of said plaintiff and "order and direct to be collected of said plaintiff," *fols.* 14 and 15.

The complaint then sets forth a resolution of the defendant's Common Council, that if plaintiff would pay this tax said payment should not be considered voluntary, but as made under protest, and after the issuing of a warrant and levy, &c., fol. 15. That pursuant to that resolution the tax was paid. The complaint then alleges that the said United States stocks were not liable—that the assessment thereof was void and prays judgment for the amount paid.

1

By the provisions of the Constitution of the United States, the stock in question was exempt from taxation. The assessors had no jurisdiction to assess the same.

Weston vs. The City Council of Charleston, 2 Peters R., 449.
Bank of Commerce vs. New York City, 2 Black, 620.
Bank Tax Case, 2 Wall., 200.
Bank vs. Mayor, 7 Wall., 16.

This stock being so exempt, it was also specially exempted from all taxation by the Revised Statutes of New York. R. S. Vol. 1, (Marg. page 388) chap. 13, Title 1, Part 1, § 4.

"The following property shall be exempt from taxation:

1. All property real or personal exempted from taxation by the Constitution of this State, or under the Constitution of the United States." The demurrer concedes that the Assessors did assess this

stock knowingly and in disregard of the exemption claimed. They were therefore clearly without jurisdiction, and the tax was illegally assessed and collected.

The judgment entered in the State Court on the decision of the Special Term was correct, and the Appellate Court of the same tribunal erred in that by the reversal of said judgment; the plaintiff was denied the exemption secured by the United States Constitution.

2

This tax having been illegally imposed and collected, may be recovered back from the defendant.

Gillette vs. Hartford, 31 Conn., 356.
Slack vs. Norwich, 33 Vermont, 818.
Preston vs. City of Boston, 12 Pick, 7.
Boston and Sandwich Glass Co. vs. Boston, 4 Met., 181.
Dow vs. Boston, 6 Gray, 131.
Dunnell Mary Co Pawtucket, 7 Gray, 277.
Joyer vs. Third School District, 3 Cushing, 567.
Shaw vs. Becket, 7 id, 442.
Toney vs. Inhabitants of Mulbury, 21 Pick., 64.
Jay vs. Oxford, 3 Greenleaf, Repts. 131, 5 Wall., 720.

The assessors not having had jurisdiction were themselves liable; Mygatt vs. Washburn, 15 N. Y. R., 316. In this case the assessors were relieved from liability by the payment of the amount of the tax, under protest, pursuant to the resolution of the defendant's Common Council. The resolution was passed and the money paid under protest, with a view to testing the validity of the tax.

The defendant admits all the facts alleged and insists that as matter of law, it has a right to retain the money so illegally collected.

3.

The judgment of the Court of Appeals and General Term of the Supreme Court of the State of New York should be reversed, and the judgment entered on the decision of the Special Term of that Court should be affirmed.

THEODORE BACON,
Attorney and Counsel for Plaintiff in Error

IN THE

United States Supreme Court.

UNITED STATES SUPREME COURT.

THE COMMERCIAL BANK OF ROCHESTER, PLAINTIFF IN ERROR,
against
THE CITY OF ROCHESTER.

Brief for Defendant.

I. The transcript of record in this case fails to show that any question was necessarily or in fact involved in the decision of the case in the State courts which brings it within the jurisdiction of this court.

II. There is no assignment of errors in brief for plaintiff in error, according to the rules and practice of this court.

III. The only points drawn in question by the pleadings and the decisions of the State courts were those relating to the particular *remedy* resorted to by the plaintiff in error. Neither the validity of any statute nor the construction of any clause of the Constitution of the United States was questioned, but, on the contrary, the State courts assumed the illegality of taxing United

States securities, fully recognizing the decisions of this court on that subject.

The General Term of the New York Supreme Court put its decision upon grounds stated in opinion by Hon. J. C. Smith, J., reported in 42d Barbour's New York Supreme Court Reports, 488.

The Court of Appeals reviewed the decision of the Supreme Court, although affirming its judgment. The grounds of both decisions will be seen from the sub joined opinions in the Court of Appeals.

It will be seen that the Court of Appeals rests its decision solely upon the ground that the plaintiff *mistook its remedy*. That an action to recover back money paid was not the proper remedy, but that the action of the assessors—they having jurisdiction of the person and subject matter—being of a judicial character, was conclusive until reversed by mandamus, certiorari or other proper proceeding.

It is respectfully submitted that the case decided by this Court—Insurance Co. v. Treasurer, 11 Wall., 204—is conclusive in this case, and that the writ of error should be dismissed.

Reference is also made to the following cases:

The Victory, 6 Wall., 382.
Gibson v. Choteau, 8 id., 314.
Worthy v. Commissioners, 9 id., 611.

GEORGE W. MILLER,
Attorney and Counsel for Defendant.

COURT OF APPEALS.

THE COMMERCIAL BANK OF ROCHESTER, APPELLANT,
agst.
THE CITY OF ROCHESTER, RESPONDENT.

STATEMENT OF CASE AND OPINIONS BY COURT OF APPEALS.

By the complaint it appears that at the time when the transactions occurred out of which the present action originated, the plaintiff was a banking association, organized, located and doing business, under the general banking laws of this State, in the city of Rochester; that in the assessment made by the assessors of that city for the year 1860, the plaintiff was assessed for personal property amounting to the sum of four hundred and twenty-four thousand two hundred and fifty-two dollars; that one hundred thousand dollars of this amount consisted of the part of the capital of the bank, which previous to and at that time was invested in the public loans and stocks of the government of the United States. When the time arrived for the hearing of applications to correct the assessments, this fact was shown to the assessors by affidavit, and they were applied to on behalf of the plaintiff to reduce its assessment for personal property by deducting the sum so invested from the aggregate amount of it, on the ground that this sum was not liable to be assessed by them. This the assessors refused to do, and retained the amount so invested in the assessment. After the assessment roll was delivered to the clerk of the common council, as it was required to be by the charter of the city, and when it came before the common council for confirmation, the same fact was shown by the plaintiff before that body, and the same application that had been made to the assessors was there

repeated. The common council declined to correct the assessment, and confirmed it as it had been made by the assessors. After that, and on the 24th day of July, 1860, the common council adopted a resolution by which it was "Resolved, That in case the Commercial Bank shall pay its tax and assessment at any time prior to the issuing of a warrant for the collection thereof, such payment shall not be treated or regarded as a voluntary payment, but as a payment under protest, and after the issuing of such warrant and a levy upon its property to enforce such payment." Four days afterward the plaintiff paid the tax assessed upon it for personal property under the terms of this resolution, and subsequently brought this action to recover back the sum of $1,460, which was the amount paid on account of the assessment made on that part of the capital of the bank which was invested in the public stocks of the United States. To the complaint stating these facts the defendant demurred, on the ground that it failed to contain a cause of action. At the General Term, the defendant had judgment on the demurrer, and the plaintiff appealed from that judgment.

Geo. E. Mumford for the appellant.

Geo. W. Miller for the respondent.

Daniels, J. The resolution adopted by the common council, and under which the money in controversy was received, contained all the substantial elements of a contract; and as it violated no positive provision of the defendant's charter, nor any of the laws of the State affecting the powers of the common council or of the city, the defendant should not be permitted to deny its validity while it retains the benefit it was designed to secure, and which was afterward received under it. The principle maintained in the decision of the case of Parish v. Wheeler (22 N. Y., 494)

is a just and wholesome one, and it should be applied by way of answer to all such objections as that made in this case, after the corporation has received and elected to hold the fruits of what it subsequently claims to have been an unauthorized contract. In the course of the opinion delivered in the decision of that case, Judge Comstock said: "In my judgment, when a sale of a chattel made to a corporation is executed, and complete in all things, except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase, is not to be entertained, especially so long as it retains, and insists upon retaining, all the benefit of the contract." "There is certainly no moral turpitude if a railroad corporation buys a steamboat or builds a church, nor is there any legal turpitude. It may be an excess of power, or a private breach of trust, in respect to its stockholders. The latter may complain, or the State may interpose, but corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty." (Id., 506–7.) The money in suit was acquired at the time under the terms stipulated upon in the resolution, and subject to the obligation created by it on the part of the defendant. After securing the advantage which the resolution shows it desired to attain, by the payment of the tax, the defendant should not be permitted to repudiate the obligation constituting the inducement for making such payment.

The effect of this resolution was to place the money in the possession of the defendant, precisely in the same manner and subject to the same liability that it would have been if it had been paid for the purpose of discharging the collector's levy under a warrant issued to him for the collection of the tax, and the case should be decided under the assumption that it was so received by the defendant.

The question presented by the case, therefore, is whether the action for the recovery of the money can be lawfully sustained, with that fact assumed in the plaintiff's favor.

It is not contended that the assessors assessing the plaintiff's personal property did not possess all the powers commonly conferred upon assessors by the laws of the State, and no reason exists for supposing that their authority in this respect was any different from what it has been found to be in the other civil divisions of the State. Consequently they had jurisdiction over the subject-matter, and over the plaintiff also, as it was located and doing business in the city, had notice of the assessment made against it, and was heard by the assessors as to its legality. It was their duty to inquire, ascertain and determine to what extent the plaintiff was liable to taxation upon its capital, and, afterward, to give public notice of their proceedings, so that the plaintiff, as well as all other persons affected by them, could examine and have them corrected if found to be erroneons. This duty was not changed, nor was their power of determination diminished by the circumstance that the plaintiff appeared before the assessors pursuant to their notice given for that purpose, and produced evidence before them, showing that it was not liable to be assessed for the property on which so much of the tax as is now in controversy was paid before the assessment was finally consummated. This was part of the evidence before them, and under which it then became their duty to decide whether the plaintiff was liable to be taxed upon so much of its capital as was shown to be invested in the stocks of the United States or not. And upon that evidence they did decide after a legal hearing of the plaintiff, holding in favor of the liability. This decision was judicial in its nature; and, as long as it has never been reversed, it was conclusive upon the plaintiff as between itself and the assessors, and all persons acting under them in perfecting, collecting or retaining the tax imposed as a consequence of the assessment. While this decision remains in force, the plaintiff has no better legal reason for questioning the defendant's right to withhold the money from it that was

collected under it than it would have to question the right of the plaintiff, in a judgment and execution, to money collected under them, on the ground that the tribunal erred in pronouncing its judgment. It is not enough to warrant a recovery that the decision was made under a misapprehension of the legal rights of the parties. That result can only be maintained where a want of jurisdiction, either of the person affected or the subject-matter, depriving the tribunal of the power of acting, can be shown, and neither of them appeared in this case. Where the determination is erroneous simply, as it was in this instance, it will afford complete protection to the tribunal pronouncing it, and to all persons acting under it by way of executing its mandate and enjoying its fruits, so long as it may remain unreversed. This is an old and well established principle, and it has been recently held by this court to be applicable to the decisions made by assessors upon the liability of property to assessment. (Swift v. City of Poughkeepsie, 37 N. Y., 511.) The error of the assessors should have been corrected by mandamus or certiorari. It cannot be done in the collateral manner resorted to in this case. The judgment should be affirmed.

WOODRUFF, J. I cannot concur in the grounds upon which the decision of this case was rested in the court below. The plaintiff insisted that a portion of its personal property had been illegally taxed; and in that the plaintiff was clearly right, as has been settled by subsequent adjudication. Nevertheless the defendants insisted upon the tax, and, according to the due course of proceeding, were about to give a warrant for its collection. If such warrant issued and was levied, a payment by the plaintiff in discharge of the levy would not have been a voluntary payment, but a payment by duress of goods. This is not denied nor doubted. In this situation of the parties, what was done? The defendant, by resolution of the common council, and

the plaintiff, by acceptance of its terms, waived the issuing and levy on the warrant, and made and accepted a payment with the same effect as if such warrant had in fact been issued and levied. This was not a mere payment under protest, or an attempt by the paying party to pay, and yet reserve his objection, but an agreement by both to abide the future determination of the question of the defendant's liability, without being prejudiced by the waiver of the warrant. This is according to the good sense and fair meaning of the arrangement; and in this it is identical with arrangements with which we are familiar in almost every day's professional experience, in which, pending a controversy, or pending an action, payments are agreed to be made, and are made, without prejudice to any existing right. The matter waived was of no possible importance to the defendant; it might be a prejudice to the plaintiff, by increasing the expense to which he was subjected. The plaintiff was, by the import of the agreement, placed in the same condition, *quoad* his right to recover back, as he would be if he paid on the issuing and levy of the warrant. The defendant was in no other or worse condition. The waiver was, therefore, a dispensing with what, in the then attitude of the parties, and in the purpose of each, was a purely formal and useless proceeding. It was competent for the common council to do this. They have the management and control of the finances, rights and interests of the city. (Charter, 148.) They had power to remit or refund where, by reason of error or mistake, an assessment is void. Now, conceding that this may not authorize the common council to extinguish any valuable right, or voluntarily to surrender a tax once imposed (which it is not necessary to say of a case in which the mistake or error is satisfactorily shown to the common council), still this is far short of holding that the common council may not make the arrangement in question.

It is a mistake to call it the waiver of a right. It is as to them the waiver of a form, and nothing more. It is

suggested that it was giving the plaintiff time to sue, and an opportunity to select his own time for suing, and that might be after the defendant had used the money. Not at all! The *agreement* wrought no such effect. The plaintiff, had the warrant issued and been levied, could pay, and then the defendant was in precisely the same situation in all those particulars. Indeed, the object was, and the whole effect of the agreement was, to place the parties in the identical position they would in that case have been in.

What right, then, did the common council waive? The right to issue the warrant and levy it, to the greater cost and expense of the plaintiff, without the gain of a farthing to the city. The case does not call for any question of the power of the common council to waive the right of this city, nor for the aid of the doctrine of estoppel *in pais*. It is enough to my apprehension to say that the parties agreed to waive the formal issue and levy of a warrant, which, in the situation of these parties, and with their then purpose, was a mere form; and no rule of law, nor, as I think, any idea of policy, forbids giving effect to the agreement according to its meaning. But the fatal and conclusive objection to the maintenance of the action is found in the decision of this court in Swift v. The City of Poughkeepsie (37 N. Y., 511). That decision seemed necessarily to follow from the cases previously decided in this court,—Van Vleeck v. Woodruff, and Foster v. Van Wyck, therein referred to, and Barhydt v. Shepard, 35 N. Y., 238.

That case does not hold that in no case will an action lie to recover back moneys collected on a tax illegally assessed; but the principle there adjudged is, that where there is jurisdiction of the person for the purpose of taxation, and jurisdiction of personal property also liable to taxation, an error in the assessment in respect to the value or amount of such personal property liable to taxation, will not warrant an action to recover back the excess beyond what was legal or just. Here where the plaintiff was a resident of the city

of Poughkeepsie, and among other personal property the liability of which to taxation was not questioned, held certain stock in a bank, whose capital was largely invested in government bonds, but the assessors nevertheless, in their valuation of the plaintiff's personal property for the purpose of taxation, made no abatement nor allowance by reason of such investments, it was held that the plaintiff's remedy, if that was erroneous, was by a direct review of such assessment, and that he could not, after the tax was collected, maintain an action against the city of Poughkeepsie to recover back the illegal excess. The distinction between taxes collected without jurisdiction and taxes collected where there was no jurisdiction but there was an error by excessive estimate of the citizen's taxable personal property, or an erroneous including therein of items or particulars of personal estate which ought not to be taxed, is recognized in the courts of Massachusetts and of Connecticut, where actions have been brought and maintained to recover back money collected, in many cases. But see Osborne v. Demour (6 Pick., 98), Preston v. Boston (12 Pick, 12), George v. Mendon (6 Metc., 513), Door v. Boston (6 Pay., 13), Lee v. Templeton (id., 579), Joyce v. Egermonts (3 Cush., 567), Bailey v. Goshen (32 Court., 546, and cases cited). And where the entire proceeding for the imposition of the tax was void, or where real estate which was by statute exempt was taxed, there money collected by warrant for such tax has been recovered back. But, as has been said in Preston v. Boston, above cited, "Where a party is liable to taxation for some personal property, and the *gravamen* of his complaint is, that he is taxed for property in respect to which he was not liable, it is essentially a case of over-valuation, and his only remedy is by appeal." (Little v. Greenleaf, 7 Mass., 236.) The present case is like Swift v. Poughkeepsie in this respect: it is claimed that, in assessing the property of the plaintiff, there was included certain personal property not liable to taxation. This was in substance an over-state-

ment of the plaintiff's taxable personal property. It was erroneous, but it was not without jurisdiction; and unless we should reconsider and reverse the decision in the case last named, this action cannot be maintained.

The plaintiff has mistaken his remedy. The decision of this Court in The People v. The Glen's Falls Ins. Co. (38 N. Y., 89), and The People v. Assessors of Brooklyn (39 N. Y., 81), show that an error in the assessment might have been corrected on certiorari; and the opinion in Barhydt v. Shepard (35 N. Y., at p. 255) suggests that a mandamus to the board of assessors will, at the proper stage of the assessment proceedings, afford relief.

The judgment must be affirmed.

Affirmed —
Grier, Davis
Strong, 16-683 April 9.
Miller
Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~448~~ 211

CHRISTOPHER CAMMACK, JR., APPELLANT,

vs.

MARGARET F. LEWIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 1, 1871.

Dec. 1, 1871